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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 638

APEX HOSIERY COMPANY, a Pennsylvania Corporation,
Petitioner,

vs.

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, PHILADELPHIA, BRANCH NO. 1, LOCAL NO. 706,
Respondents.

BRIEF FOR RESPONDENTS

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I. OPINIONS BELOW

The opinion of the District Court for the Eastern Dist of Pennsylvania was filed April 24, 1939, and has not n officially reported. However, it appears in the Record age 1389.

The opinion of the Circuit Court of Appeals for the rd Circuit, reversing the judgment entered in the Dis- Court, was filed November 29, 1939, and is reported 08 F(2d) 71. It appears in the Record at page 1399.

II. JURISDICTION

The jurisdiction of this Court has been invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A. Section 347(a).)

III. STATEMENT OF THE CASE

The Apex Hosiery Company, a Pennsylvania Corporation, petitioner, brought this civil action in the District Court for the Eastern District of Pennsylvania, against the respondent Union; William Leader, its President; Joseph Burge, its Vice-President; Harry Omeig, its Treasurer; and Huey Brown, its Secretary; claiming to recover losses to its property and business sustained by reason of a sit down strike at its plant, from May 6, 1937, until June 23, 1937, when the strikers left the plant, in compliance with an injunction issued by Judge Kirkpatrick, following the decree of the Circuit Court of Appeals. (See: Apex v. Leader, 90 Fed. (2d) 155.)* There is no diversity of citizenship in this case. The cause of action is based upon Section 4 of the Clayton Act.

The Apex Hosiery Company has a plant in Philadelphia, in which, during 1937, it employed about 2500 workers (R. 101). The plant produced about 100,000 dozen pairs of women's hosiery per month (R. 102, 107, 1215). The Company shipped about 85% of its production into other states

*Reversed because cause was moot in Leader et al. v. Apex, 30[illegible] U. S. 656.

(R. 109). There is no evidence that the Union had knowledge of these facts.

Prior to the sit-down strike, the plant was operated as an open shop (R. 110).

About the middle of April, 1937, Leader sent a letter to Apex, enclosing a form of contract, which provided, inter alia, for the closed shop, more properly referred to as the "all union shop" (R. 120).

On May 6, 1937, union members employed in other mills in the City of Philadelphia, stopped work for the purpose of coming to the Apex Plant (R. 82, 98). However, the plant had closed down at or about 1:00 o'clock p. m., upon orders issued by Meyers, President of the Apex Company (R. 126, 257), and all workers had gone except maintenance and office workers. Beginning about 2:00 p. m. o'clock on May 6, 1937, thousands of people gathered around the mill (R. 126, 216).

Leader was seen on the steps outside of the mill. He requested admission for the purpose of conferring with Meyers. A conference was refused (R. 127). Leader was heard to declare in a loud voice, "A strike and a sit down" (R. 128). Immediately thereafter, stones were hurled through the windows, the doors were smashed and the crowd surged into the plant (R. 261); machines, equipment, furniture and merchandise were damaged (R. 128); Meyers, the President, and Struve, the General Superintendent of the plant, as well as other employees were assaulted and injured. The jury found that the Union was not responsible for the violence and damage committed on May 6, 1937 (R. 1365).

Leader was sent for and he came into the mill with a committee of Apex workers, and asked Meyers to sign an agreement (R. 129). Meyers refused to sign the agreement.

From May 6 to June 23, 1937, about 150, or more, Apex employees (R. 265) remained in the plant on a "sit-down" strike (R. 138-139, 242, 264, 325), which was authorized and supported by the Union (R. 1363-1364) for the purpose of obtaining an "all union shop" agreement (R. 305).

On June 21, 1937, the Circuit Court of Appeals reversed the decree of the District Court and ordered Judge Kirkpatrick to issue a sweeping injunction, commanding the sit-downers to evacuate the plant, and restraining the union and its membership from various forms of activity. (Apex v. Leader, 90 Fed. (2d) 155), and on June 23, 1937, the strikers left the plant (R. 139-140).

The jury was told by the learned Trial Judge below that the Circuit Court of Appeals held in its former opinion that there was an intention to restrain commerce and to violate the Sherman Act (R. 140).

During the occupancy of the plant by the sit-downers, none of the officers of the Company were permitted to perform their duties in the plant (R. 271). Only watchmen (R. 295) and maintenance men (R. 311) were allowed into the plant (R. 296). The locks on the doors leading into the plant were changed by the sit-down strikers. Machines in the plant were damaged on June 10, 1937 (R. 297-298, 420, 422) and on June 23, 1937 (R. 144, 299, 433, 442). During the period of the sit-down strike, the Company was unable to carry on any operations, and due to the fact that the machines had been damaged, the plant was not able to begin production until August 19, 1937, and full production was not achieved until November 1, 1937 (R. 146).

On May 6, 1937, there was on hand in the plant a total of 130,000 dozen of finished merchandise and merchandise in the greige (undyed and unfinished) (R. 145). There is testimony that counsel for the Company requested Leader

to permit them to go into the plant for the sole purpose of removing the *finished merchandise*, so that it could be shipped against orders, and that Leader refused (R. 619, 620). Leader denied this. There was no evidence that the Union actually authorized the alleged refusal or had knowledge of the request, or the refusal.

Machines were damaged by actual violence (R. 296) and due to lack of use (R. 273).

The petitioner proved damages to plant, equipment, and merchandise which occurred on May 6, 1937, amounting to $26,490.12 (R. 1358), which was not allowed by the jury (R. 1365).

The petitioner proved damage to plant, machinery, and merchandise between May 6 and June 23, 1937. The jury allowed $82,644.59 on this item (R. 1361, 1364).

The petitioner proved overhead expenses in the sum of $122,742.95 (R. 968).

The Company proved that it had earned profits from January 1, 1937 to May 6, 1937, at the rate of $6,111.00 per week (R. 1164, 1358). The Company had operated at a loss during the years 1933, 1934, 1935 and 1936 (R. 1172-1173). A general slump in the market occurred during the last six months of 1937 (R. 1247, 1263). However, more hosiery was sold during 1937 than 1936 (R. 1261). In 1936 the annual national shipments were 37,400,782 dozen pairs. In 1937, the annual national shipments were 39,678,-784 dozen pairs of hosiery (R. 1261). The productive capacity of all the full fashioned hosiery mills in the United States was 8,000,000 or 10,000,000 dozen pairs more than the sales (R. 1233-1234). There was no change in prices (R. 1195-1196).

At the conclusion of the petitioner's case, the respondents moved that the case be dismissed, which motion was

denied (R. 628). At the conclusion of the entire case, the respondents filed a motion for a directed verdict for the defendants, in accordance with Rule 50 (b) of the New Rules of Federal Practice, which motion was denied (R. 1305, 1348).

The jury was given a list of questions propounded by the learned Trial Judge in the nature of special findings of fact (R. 1354-1357, 1363, 1367).

The jury returned a verdict for the petitioner and against the respondents. As to the defendants Joseph Burge, Vice-President; Harry Omeig, Treasurer; and Huey Brown, Secretary of the Union, the jury found for the defendants and against the plaintiff (R. 1361). A motion was made that the verdict be trebled, and this was done (R. 1363). A judgment was entered on the trebled verdict in the sum of $711,932.55, together with counsel fees in the sum of $25,000.00, allowed by the Court, and costs to be taxed (R. 1368).

The respondents filed a motion to set aside the verdict and judgment against them (R. 1369) and also a motion and reasons for new trial (R. 1370-1388). The learned Trial Judge below dismissed the motions and his opinion appears at R. 1389-1391.

On appeal the Circuit Court of Appeals, in an opinion filed Nov. 29, 1939, (R. 1399-1417) reversed the judgment and remanded with instructions to enter judgment for the respondents herein.

The petitioner filed a petition for rehearing (R. 1421-1436) and same was denied on Dec. 27, 1939 (R. 1437).

On January 12, 1940, petitioner filed its petition in this Court for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, which petition was granted on February 26, 1940.

IV. SUMMARY OF ARGUMENT

It is contended that the Sherman Anti-Trust Act does not apply to labor unions. The statute contains terms of art, namely, "contract in restraint of trade" and "combination or conspiracy in restraint of trade". These terms must be given their common law meaning, otherwise, the entire Sherman Act is unconstitutional and void, as violative of the due process clause of the Fifth Amendment to the United States Constitution. *Cline v. Frink Dairy Co.*, 274 U. S. 445.

At common law, the terms "contract in restraint of trade" and "combinations or conspiracies in restraint of trade" did not apply to labor unions. This is clear upon consideration of the public policy underlying the doctrine inhibiting contracts and combinations in restraint of trade at common law. Chief Justice White, who had dissented in the case of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897), insisted in his dissenting opinion that to read out of the Sherman Act the rule of reason is to include within the terms of that statute combinations of workers. Since the rule of reason, as expounded by Chief Justice White, became the doctrine of the Supreme Court in *Standard Oil Company v. United States*, 221 U. S. 1, it follows that labor unions are not within the terms of the statute.

This conclusion is amply supported by the Congressional debates, which establish decisively that the legislature intended to exclude labor unions from the purview of the act. The Congressional debates, and particularly the explanation of the bill as given by Senator Hoar, the author,*

*See 2 Hoar: Biography of Seventy Years, p. 364 (1903).

demonstrate clearly that Congress was referring to th common law relating to contracts and combinations in re straint of trade, as it existed in old times in England. I we limit our view to old times in England, it is apparen that the only branch of the common law taken up by th Congress is that which related to monopolies and th means whereby combinations of men suppressed competi tion by engrossing the market to the detriment of th people. Since Congress was seeking an instrument to curb trusts which constituted a threat to the national well-being at the time of the enactment of the Sherman Act, it is clea that the law, as formulated, was intended to strike at th trusts.

The general course and trend of the Congressional de bates show conclusively that Congress was meticulous i selecting terms to be embodied in the statute which woul strike at the trusts only and which could not be converte into an instrument to endanger the existence and growt of labor organizations and farmers' organizations.

That Congress had no intent to embrace the very ol common law doctrine which held that guild rules or con stitutions were in restraint of trade, is further confirme by the fact that at the time of the enactment, rules of u ions whereby restraints were imposed upon the member were not deemed contracts in restraint of trade; nor wer labor unions, which were formed to promote the economi and social welfare of the workers, considered illegal in an sense. The very old common law doctrine relating to th guilds emerged at a time when the social organization o England was entirely different from that prevailing i America in 1890.

The Supreme Court in *Loewe v. Lawlor*, 208 U. S. 27 held that the Sherman Act made no distinction betwee

classes, and that it embraced combinations of workers, as well as business combinations. In this respect, it is submitted the Court committed at least two errors: (a) It gave to the terms of the statute a meaning other than those terms had at common law; and (b) It mis nterpreted the Congressional intent.

A consideration of the times immediately preceding the enactment of the Clayton Act, and a review of the Congressional debates with reference to Section 6 and Section 20 of the Clayton Act, show that it was the intent of Congress to obviate the judicial construction placed on the terms of the Sherman Act in *Loewe v. Lawlor*.

Independently of the foregoing argument, it is contended that the activities involved in this case do not come within the Sherman Act, even if we accept all of the decisions of the Supreme Court in the labor cases as having been correctly decided. It is clear that Sections 1 and 2 of the Sherman Act are limited by the commerce clause of the Constitution, and it has been held that local activities of employees on strike are not within the reach of the Federal power under the Sherman Act. In those cases where the Sherman Act was applied to labor disputes, the Court found that the conspiracy was directly aimed at interstate commerce and that the conspiracy was vitalized by an intent to monopolize the supply of the commodity entering and moving in interstate commerce, or to fix the price of the commodity in interstate markets. This vital distinction is made clear in the *Second Coronado Coal Case*, 268 U. S. 295. Furthermore, the principle of decision in the *Second Coronado Case* has undoubtedly been obviated from the law by the National Labor Relations Act. It is also beyond dispute that the activities condemned in the "secondary boycott" cases were rendered legal by the Norris-LaGuardia Act.

In this case, the jury did not and indeed could not find the kind of intent which turned the case in the *Second Coronado Case*. The jury merely found that the union intended to conduct a sit-down strike.

The petitioner maintains that since the sit-down strike stopped production and prevented the petitioner from manufacturing its product, which it normally ships into other states, the respondents intended to restrain commerce within the meaning of the Sherman Act. The petitioner's contention in this respect is manifestly based upon an erroneous conception of the principle under which the National Labor Relations Act has been held constitutional, and also upon a failure to distinguish between the colloquial meaning of the word "restrain" and the "terms of art" contained in the Sherman Act.

It is clear, however, that the National Labor Relations Act and the decisions of this Court upholding its constitutionality, have not expanded the meaning of "commerce" contained in the commerce clause of the Constitution, nor did those decisions extend the application of the Anti-Trust Act.

The petitioner maintains that the Circuit Court erred in holding that a substantial amount of the commodity must be involved in a case brought under the Sherman Act. It is clear, however, that there could be no suppression of competition, no monopoly of supply, nor price fixing unless a substantial amount of the commodity is involved in the conspiracy. In this case, there was no suppression of competition on the markets; there was no fixing of prices; nor was there any monopoly of supply. Indeed, it is evident that the respondents had no intentions to effect such results. The union in this case employed the sit-down tech-

nique in order to obtain an agreement providing for the "all union shop",—a purely local matter.

Although the acts committed by the respondents in this case were violent, it is clear on principle, as well as established authority, that a violation of the Sherman Act does not depend upon the illegality of the means.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Third Circuit in this case should be affirmed.

V. ARGUMENT

A. The Sherman Anti-Trust Act Does Not Apply to Labor Unions

At the roots of this case is the challenging question: Does the Sherman Act apply to labor unions? This question is open, in this case, since the lower court did hold that the Sherman Act

> "by its very terms * * * includes the activities of any and all organizations in restraint of trade, and renders them illegal. Congress did not limit the restraint imposed by the Act to business combinations. It included all combinations in restraint of trade within the purview of the Act. See Loewe v. Lawlor, 208 U. S. 274; Gompers v. Buck's Stove and Range Co., 221 U. S. 418; United Mine Workers v. Coronado Coal Company, 259 U. S. 344; Coronado Coal Company v. United Mine Workers, 268 U. S. 298; Bedford Cut Stone Co. v. Journeymen Stonecutters' Association, 274 U. S. 37." (R. 1403)

In this respect, this case differs from *United States v. Borden*, 308 U. S. 188. Furthermore, the Circuit Court below considered the effect of Section 6 of the Clayton Act, Act of October 15, 1914; c. 323, 38 Stat. 731, 15 U. S. C. Section 17, and in answer to the contention, that, by this Section, Congress intended to remove labor unions from the purview of the Sherman Act, held, on the authority of *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, that Section 6 of the Clayton Act did not accomplish that result.

Despite the fact that this Court, in *Loewe v. Lawlor*, 208 U. S. 274, had construed the Sherman Act as having a broader application than at common law, and included labor unions, it is respectfully submitted that this was an erroneous construction;

(a) It gave to the terms of the Act a broader application than they had at common law.

(b) It relied upon two former decisions by the Supreme Court, namely, *U. S. v. Trans-Missouri Freight Ass'n.*, 166 U. S. 290 (1897), and *U. S. v. Joint Traffic Association*, 171 U. S. 508 (1898), which likewise did not construe the terms of the Act in accordance with the common law concepts. But the broad construction adopted in these two former decisions had been repudiated by a majority of the Court in the case of *Northern Securities Co. v. U. S.*, 193 U. S. 197 (1904).

(c) It erroneously imported into the concept "combination in restraint of trade" a principle of tort law which had application to private, not public, wrongs.

(d) It stems from an unwarranted and incorrect version of the legislative debates in ascertaining the legislative intent.

It is respectfully submitted that this was an erroneous interpretation and construction of the statute, and that this Court will, as it did in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, correct such erroneous construction, though long adhered to, if upon reconsideration of the statute, the error is clear.

Our present contention is that, as a matter of statutory construction, the Sherman Act, by its very terms, excludes labor unions, and that such construction is confirmed by the

legislative intent, which was clear throughout the entire course of the Congressional debates.

Obviously, the Clayton Act was not intended to bring labor unions within the Sherman Act. On the contrary, Section 6 and Section 20 of the Clayton Act were amendments, calculated to immunize labor unions from the operation of the Sherman Act. It is therefore clear that if the Sherman Act does not, by its very terms, include labor unions, that Section 6 of the Clayton Act did not operate to bring them within that statute.

1. The Terms "Contract in Restraint of Trade" and "Combination or Conspiracy in Restraint of Trade" Must Be Given their Common Law Meaning, Otherwise the Entire Sherman Act Is Unconstitutional and Void

The Sherman Anti-Trust Act was designed by Congress in 1890 to arm the Federal Government with an efficient instrument to curb trusts and monopolies, which were deemed to be injurious to the public at large, in concentrating economic power and control in the hands of the few, to the detriment of the many. The statute was directed at the evils of the trusts, and it was only against these menacing economic aggregates that Congress fashioned this law.

The policy underlying the statute is significant as an aid in its interpretation and construction, but the construction itself must be in accordance with the specific terms contained in the statute. Whereas, at common law, contracts and combinations in restraint of trade were merely void in the sense that the courts would not lend their coercive power in aid of the covenant or combination, the Sherman Act declared illegal such contracts and combinations, "in the form of trusts or otherwise", and imposed grave criminal and civil penalties. The statute took up from the com-

mon law the historical "terms of art" as particularly descriptive of the distinguishing attributes of the trusts.

The statute is only as broad as it is written, and an application of the statute to activities or classes other than those stated or described in it, even though such other activities or classes may constitute threats to the national well being, is unwarranted. With the entire field of interstate and foreign commerce entrusted to its sole care, the legislative power may be exerted against some evils and not others. This is a matter of legislative choice. The fact that other acts or activities are injurious to the public interest, or are so considered by the judicial branch of the government, and might also have been treated by the legislature at the same time it treated those specifically described in the statute in order to more perfectly protect the public interest, is no reason for judicial expansion of the statute beyond its terms.

As this Court pointed out in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1.

> "We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power." (p. 46)

Both before and after the decision in *Loewe v. Lawlor, supra*, this Court construed the Sherman Act, in cases involving business combinations, in accordance with the common law meaning of its terms. In the early cases, except two, involving business combinations, prior to the decision in *Loewe v. Lawlor*, this Court construed the statute in accordance with the common law meaning of the technical

terms "contract in restraint of trade" and "combinations or conspiracies in restraint of trade". To do otherwise this Court later pointed out, would render the statute void and totally invalid, as violative of the due process clause of the Fifth Amendment of the United States Constitution, and also as an invalid delegation of legislative power to the judiciary. It is plain that unless the terms set forth in the Act have a sufficiently precise meaning, not only to guide the courts in applying it, but to inform all persons of the kind of acts which are forbidden by law, the statute is unquestionably void, and invalid.

In *Standard Oil Company v. U. S.*, 221 U. S. 1, the statute was attacked as an invalid delegation of legislative power to the judiciary; but this contention was rejected by the Court, which held that the terms used in the statute were derivable from the common law, and were sufficient standards to guide judicial application. However, in *Cline v. Frink Dairy Co.*, 274 U. S. 445, the Court really saved the statute from total invalidity under the due process clause of the Fifth Amendment. The Court in that case said:

> "In the Nash Case we held that the *common law precedents* as to what constitute an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute." (p. 460)

And further, the Court said,

> "The common law precedents as to forbidden and permissible restraint of trade were reviewed at great length by the Circuit Court of Appeals of the Sixth Circuit in the case under the Federal Anti-Trust Act in U. S. v. Addyston Pipe and Steel Co., 85 F. 271; affirmed 175 U. S. 211."

And further, the Court said,

> "The language of the Federal statute was read in the light of the *common law* and in accordance with *its reason*, and was construed not to penalize such partial restraints of trade as at common law were not only permitted but were promoted in the interest of the freedom of trade itself." (p. 461) (Italics supplied).

This being so, the statute must be viewed as having taken up *only* that portion of the common law which treated the subject of contracts and combinations in restraint of trade, and no other. Whether or not other activity was deemed illegal at common law, either under statutes or judicial decisions, is immaterial to the point here involved, for the Sherman Act took up only the common law heading relating to the field of restraint of trade,—a branch of the law which dealt with protection of the public interests.

Whether the statute did have a meaning broader than its terms in the light of the common law or not was the subject of sharp disagreement in the Supreme Court in the first few cases in which the government attempted to utilize the Sherman Act against business combinations involving railroads. In the *Joint Traffic* and the *Freight Association Cases, supra*, the majority view was that the terms used in the statute were broader than their meanings at common law.

Since the principle in these cases constitutes one of the grounds upon which the case of *Loewe v. Lawlor, supra*, turned, namely, the construction to be placed upon the statute, it is important that we ascertain the fate of that broad construction. In this connection, the dissenting opinion of Justice White in the *Freight Association Case, supra*, concurred in by three other Justices, is extremely important,

because he points out that to give the statute a construction which holds that *reasonable combinations* are within its purview, brings labor organizations and their activities within the statute. He insisted that the "rule of reason" must be deemed a part of the statute, *otherwise labor unions* would be embraced within it and he referred to the case, *In Re Debs*, 64 F. 724, 745-755, 158 U. S. 564, as proof of the error of the broad construction. He stated,

> "The interpretation of the statute, therefore, which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition, either by obtaining an increase of wages or diminution of the hours of labor. Combinations among labor for this purpose were treated as illegal under the construction of the law which included reasonable contracts within the *doctrine* of the invalidity of contracts or combinations in restraint of trade; and they were only held not to be embraced within that doctrine, either by statutory exemption therefrom or by progress which made reason the controlling factor on the subject. *It follows that the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition.* It is therefore, as I see it, absolutely true to say that the construction now adopted which works out such results, not only frustrates *the plain purpose intended to be accomplished by Congress*, but also makes the statute tend to *an end never contemplated, and against the accomplishment of which its provisions were enacted.*" (p. 356) (Italics supplied).

The "rule of reason" thus contended for by Justice White became the accepted doctrine of this Court in the *Standard Oil Case, supra,* and should operate to exclude labor unions from the purview of the Act. The same conclusion flows from the common law precedents involving contracts or combinations in restraint of trade.

In *Hopkins v. U. S.*, 171 U. S. 578, (1898) Justice Peckham pointed out

> "To treat as condemned by the Act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the *application of the Act far beyond the fair meaning of the language used* * * *"

He then enumerated agreements of a character which he deemed to be beyond the *fair meaning of the language used*, and amongst other rhetorical questions, asked

> "Would an agreement among themselves by locomotive engineers, firemen or trainmen, engaged in the service of an interstate railroad, not to work for less than a certain named compensation, be illegal because the cost of transporting interstate freight would be thereby enhanced?" (pp. 592-594)

It is significant that Justice Peckham referred to the *application* of the Act, to show that it did not reach labor unions.

In *Northern Securities Company v. U. S.*, 193 U. S. 197, (1904), the Court limited the construction and interpretation of the statute to the common law criteria of its terms. In that case, there were four separate opinions. Five of the Justices, including Justice Brewer, agreed that there had been a violation of the statute. The other four justices contended that there had not been a violation of the statute.

However, a majority of the Court, *including Justice Brewer*, construed the statute in accordance with the common law doctrine. Justice Brewer's concurring opinion is significant because he had agreed with the majority in the *Freight Association Case, supra,* despite the dissenting opinion of Justice White as to the proper construction of the statute. He said,

> "Whenever a departure from the common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. *Such a purpose does not appear and such a departure was not intended.*" (p. 361)

2. At Common Law the Terms "Contract in Restraint of Trade" and "Combinations or Conspiracies in Restraint of Trade" Did Not Apply to Labor Unions in their Relation with Employers

Justice Holmes wrote a dissenting opinion in the *Northern Securities Case* in which White, Fuller and Peckham, JJ. concurred. This opinion is most important because in it is set forth the precise meaning of the terms "contract in restraint of trade" and "combinations or conspiracies in restraint of trade". His construction of the statute was made without reference to "the question of the power of Congress". (p. 411).

> "The Act says nothing about competition. *I stick to the exact words used.* The words hit two classes of cases *and only two* * * * contracts in restraint of trade are dealt with and defined by the common law * * * *Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business and the trade restrained was the contractor's own. Combina-*

tions or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business * * * They were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm." (p. 403) (Italics supplied)

ustice Holmes construed Sections 1 and 2 of the statute *in pari materia*, and said,

"All that is added to the first section by section 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the states." * *

hroughout his opinion, Justice Holmes lays emphasis n the fact that the statute is directed against such con- ts which impair *business by self-restraint imposed by act*, and such combinations resulting from agreements *keep rivals out of the business and ruining those already* (Italics supplied)

further construing the statute, Justice Holmes pointed that Section 7 thereof, which created the civil right for le damages, gave an action to

"outsiders who are injured in their attempts *to compete with a trust or other similar combination* * * *" (p. 405) (Italics supplied).

e conclusion to be drawn from this opinion is that r unions are not within the terms of the statute since

(a) The statute was directed against trusts and not against labor unions. Labor unions do not engage in business.

(b) The type of contract (constitution, by-laws and rules) which binds workingmen together is not within the field of competitive business relations.

In *Standard Oil Company v. U. S.*, 221 U. S. 1 Chief Justice White construed the statute in accordance with the common law meaning of its terms, and made the "rule of reason" the doctrine of this Court. He said,

> "There can be no doubt that the sole subject with which the first section deals is restraint of trade *as therein contemplated*, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning *took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the Act in question* * * *. (p. 57) It came moreover to pass that contracts or acts which it was considered had a *monopolistic tendency*, especially those which were thought to unduly diminish competition and hence to enhance price—in other words to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade and therefore as being *in restraint of trade*. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted with treating such acts as we have said as amounting to monopoly * * * served to enforce and illustrate the purpose to prevent the occurrence of the

evils recognized in the mother country as consequent upon monopoly by providing against contracts or acts of individuals or *combinations of individuals or corporations deemed to be conducive to such results.*" (Italics supplied)

In this case, he construed Sections 1 and 2 as *in pari materia*, and said that the second section of the Act was intended

"to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded * * * Having by the *first section* forbidden all means of *monopolizing trade, that is unduly restraining it*, by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the Act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is restraints of trade, by any attempts to monopolize or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about, be not embraced *within the general enumeration of the first section.* And, of course, when the *second section is thus harmonized with and made as it was intended to be, the complement of the first* * * *" (pp. 60-62) (Italics supplied)

We have already seen that in the view of Chief Justice White, the "rule of reason" excludes labor unions from the operation of the statute.

We have pointed out that in the *Cline v. Frank Case*, *supra*, the Court took up the opinion in the *Addyston Case*, 175 F. 271. Judge Taft, in the latter case, explained the reason for the exemption of "partial restraints of trade". The

"rule of reason" represented a relaxation of the old common law doctrine relating to contracts in restraint of trade. It really meant that the covenantee would receive protection and be entitled to judicial aid and enforcement of the restrictive covenant if it was

> "merely ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party". (p. 282)

In *Horner v. Graves*, 7 Bing, 735, 131 Eng. Repr. 28, Tindal, C. J., lays down the test of reasonableness of such covenants as follows:

> "Is the restraint such as to afford fair protection to the one receiving it and not so large as to interfere with the interests of the public?"

It is thus clear that the main purpose of the contract serves as the basis of judgment of the measure of protection needed by the covenantee. If the covenant exceeds the necessity presented in the main contract, it is void because

(a) It oppresses the covenantor without any corresponding benefit to the covenantee; and

(b) It tends to a monopoly.

Judge Taft continued and discussed combinations in restraint of trade, and pointed out that where the sole object of the combination is to restrain competition and to enhance and maintain prices, it is against public policy and there is nothing to justify or excuse it. It tends to monopoly and is void. As to *such* combinations, the common law has no exculpatory "rule of reason".

(a). The Public Policy Underlying the Inhibitions against Restraints of Trade at Common Law

The common law rule against combinations in restraint of trade is deeply rooted in a public policy which seeks to protect the people from the evils of monopoly.

> "This must be injurious to the public, by putting it in the power of one or two rich men to raise the price * * *"
>
> *IV Blackstone, Commentaries, 158.*

In *Mitchel v. Reynolds*, 1 P. Wms. 181, 190 (1711), 24 Eng. Repr. 347, Chief Justice Parker, as though foreseeing the evil of the "trusts", said, in declaring the public policy underlying the rule against contracts in restraint of trade,

> "Another reason is the great abuses these voluntary restraints are liable to; as for instance, from corporations who are perpetually laboring for exclusive advantages in trade, *and to reduce it into as few hands as possible.*"

Judge Taft, in the *Addyston Case, supra*, referred to *Alger v. Thatcher*, 19 Pick. 51, 54, for additional considerations of public policy underlying the common law rule and these were that they

> "prevented competition and enhanced prices; they exposed the public to all the evils of monopoly and this especially is applicable to wealthy companies and large corporations who have the means, unless restrained by law, *to exclude rivalry, monopolize business and engross the market.*"

Before turning to the Congressional debates, we think clear upon considerations of such public policy that com-

binations of workers in their relations to employers were not deemed illegal at common law as in restraint of trade. A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act, and of the mischief to be remedied, makes it clear beyond dispute that labor unions are not within the purview of the Act, and did not constitute the evil to be remedied. *Atlantic Cleaners & Dyers, Inc. v. U. S.*, 286 U. S. 427. Manifestly, the rules and regulations of labor unions, whereby the members assume restraints upon their freedom of action in employment, cannot be deemed within the Federal power under the Sherman Act.

We may now turn to the Congressional debates to confirm the contention that the Sherman Act does not, by its very terms, apply to labor unions.

3. The Congressional Debates Establish Decisively that the Legislature Intended To Exclude Labor Unions from the Purview of the Act

To avoid any misunderstanding, it must be made clear at the very outset that all references to labor unions during the course of debate, were made regarding the bill reported by the *Committee on Finance* and that *this bill* was directed at

> "all arrangements, contracts, agreements, trusts or combinations * * * made * * * with a view or which tend to prevent full and free competition in articles of growth, *production*, or *manufacture* * * *; and all arrangements, trusts or combinations * * * made with a view or which tend to *advance the cost to the consumer* * * * (21 Cong. Rec. 2455) (Italics supplied)

The bill, which was finally adopted, was reported out by

the *Committee on the Judiciary* as a substitute measure, and it was stated in the *common law terms.*

We will therefore consider the debates under two headings:

(a) The Debate in the Senate on the Bill as Reported by the Committee on Finance

It is permissible to turn to the Congressional debates for aid in the construction of legislation, where its meaning is doubtful or obscure. Our contention is that the meaning of the Sherman Act is neither doubtful nor obscure. But in *Loewe v. Lawlor, supra*, the Court did refer to the Congressional debates to confirm its view that labor unions were embraced within its sphere. It should be proper to reexamine the debates to ascertain whether the Court arrived at a proper conclusion. But at all events, resort can be had to the debates in general

> "in order to show common agreement on purpose as distinguished from interpretation of particular phraseology."
>
> *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke*, 300 U. S. 440 (1937). (Note 8.)

During the course of the debate, all of the Senators, who spoke against the bill, attacked it on two grounds:

1. They entertained doubt as to the constitutional authority of the Congress to reach the trusts; and

2. They thought the bill was so broad in its terms, that, instead of accomplishing the objective of striking down the trusts, it would be utilized to attack organizations of workers and organizations of farmers.

All of the Senators were in accord that labor unions

and farmers' organizations were economically necessary and constituted no threat to the nation. Only Senator Edmunds thought that if legislation was designed against enhancement of prices by combinations of employers, inhibitions should be directed against combinations of workers to prevent wage increases.

Senator Vest, conceding the "terrible evil" of the trust, thought that the proper approach to the problem was to deprive these trusts of the benefits of the high protective tariff. (21 Cong. Rec. 2465).

Senator Pugh argued that the Federal government might not have power to reach the trusts; but he, like all the others, wanted to devise an efficient, constitutional and valid measure "to prevent or mitigate these evils". (21 Cong. Rec. 2558).

Senator Ingalls introduced an amendment, so that the bill would operate against options and futures, which proposal Senator Sherman objected to, because it created a tax which must originate in the House (21 Cong. Rec. 2559).

Senator Teller pointed out that the bill, as drawn, referred to prices, and therefore must of necessity include the Farmers' Alliance and other farmer organizations, and asked,

> "Does anybody believe that these organizations are inimical and hostile to the public welfare?" (21 Cong. Rec. 2561).

Senator Teller reiterated the same criticism Senator George had made to a former bill reported by the Finance Committee, and showed that this bill reaches labor organizations, as well as farmers' organizations. (21 Cong. Rec. 2561). Without contradiction, Senator Teller argued that the bill, as drafted, would take in all labor unions, and

that this was clearly *not intended*. He read a statement in a daily paper, regarding the sweated conditions of tailors in London, and stated that surely no one intended to prevent laborers from combining to improve their conditions. He pointed out further that a bill should be properly drafted, which would be *confined to trusts and not because of poor drafting, strike down farmer and labor groups.*

Senator Stewart introduced into the record the English Act of 1844, to abolish the offenses of forestalling, regrating and engrossing, and other statutes. He argued that the difficulty with such legislation was that the offense could not be properly defined. He said, prophetically,

> "that the true remedy against such trusts is that of counter combination among the people * * * I think the bill is on the wrong basis and it will cut in the wrong direction if it passes." (21 Cong. Rec. 2566).

Senator Hoar criticized the bill as ineffective, and technically bad. (21 Cong. Rec. 2568).

Senator Platt stated that he thought the bill may not reach the trusts at all. (21 Cong. Rec. 2568).

Senator Hoar then said, in commenting on the crudity of the bill, that because of haste,

> "We may get up some crude hasty legislation, which does not cure the evil, which keeps the word of promise to the ear and breaks it to the hope." (21 Cong. Rec. 2568).

Senator Teller stated,

> "My real objection to this bill is that it is delusive."

He made specific reference to the Act of 1884 of France, which encouraged the organization of laborers, and the organization of farmers. He feared that the bill, then being

debated, would attack the farmer and labor groups, rather than the trusts. Because the bill in his opinion was not well drawn, delusive and could be turned against farmers and labor organizations, he suggested that the bill be referred to the Judiciary Committee so that they should bring out a bill

> "which will be constitutional and which will be vigorous and effective * * * and do what I have no doubt the Senator from Ohio (Sherman) wants to do." (21 Cong. Rec. 2572).

Senator George then moved that the bill be referred to the Judiciary Committee and he reviewed the course of the many Sherman proposals. He showed that the first proposal was introduced on August 14, 1888; and a second proposal was reported out by the Committee on Finance on September 11, 1888, but that both proposals were bad on constitutional grounds; that on January 25, 1889, a third bill was proposed, which also was bad on constitutional grounds; that at the 51st Congress, then in session, on January 14, 1890, the Finance Committee reported out still another bill, which also was bad on the grounds of jurisdiction; that on March 18, 1890, the bill, then under discussion, was reported out and was based upon another purported constitutional power. He argued, from this review, that the Finance Committee was apparently unable to find constitutional warrant for the legislation desired, and contended that the bill should be sent to the Judiciary Committee, which is in charge "of these great questions". (21 Cong. Rec. 2600).

Senator Platt argued in favor of the motion to refer, so that a proper bill would be formulated. (21 Cong. Rec. 2607).

There was fear by some of the Senators that the motion to refer to the Judiciary Committee was a tactic calculated to kill the bill.

After some more debate, in which Senator Morgan argued that the bill was an empty shell, that it would fail to accomplish the desired objective, and that it endangered labor unions, the motion to refer to the Judiciary Committee was lost.

The Senate, still sitting as a Committee of the Whole, then passed the Reagan amendment, as a substitute for the original bill proposed by the Committee on Finance. (21 Cong. Rec. 2611).

Because of the criticism that the bill was delusive and not well drawn, and could be applied against labor unions and farmers' organizations, which was a result not desired by any Senator, Senator Sherman offered an amendment to his bill, not because he thought it was necessary, but "to avoid any confusion". Senator Sherman was the Chairman of the Finance Committee and in charge of the bill. The amendment is as follows:

> "provided that this Act shall not be construed to apply to any arrangements * * * between laborers, made with a view of lessening hours or increasing wages, or to arrangements * * * among persons engaged in horticulture or agriculture, made with the view of enhancing the price * * * " (21 Cong. Rec. 2611).

It is interesting to note that at this point Senator Blair offered an amendment to exclude by similarly specific language the cod fisheries and the organizations of manufacturers of boots and shoes. (21 Cong. Rec. 2611).

Senator Platt wanted to protect associations of wool combers, so that they would be excepted from the bill, as

well as labor unions and farmers' organizations. (21 Cong. Rec. 2612).

The Senate sitting in Committee of the Whole, then *adopted the foregoing proviso offered by Senator Sherman as an amendment to the bill.* (21 Cong. Rec. 2612).

Senator Edmunds spoke to the Sherman proviso, which *had already been adopted*, and during the course of his remarks, he argued that capital and labor constitute an equation, and that because of the growth of trusts, which spanned the states, workers had combined in self-defense. He argued that the existence of the trusts led to widespread labor unions, and that the country was beset by these two conflicting groups. He contended that it was wrong to permit workers to combine to increase their wages, if employers were by this bill prohibited from combining to increase prices to offset the wage increases. (21 Cong. Rec. 2727).

Senator George punctured this argument by showing that nothing in the bill prevented each manufacturer from putting up his price separately in order to overcome the wage increase obtained by the combination of workers. (21 Cong. Rec. 2727).

Senator Hoar made the complete answer to Senator Edmunds as follows:

> "he thought that the applying *to laborers* in this respect a principle which was *not applied* to persons engaged in the *large commercial transactions* which are chiefly aimed at by this bill was indefensible in principle. Now it seems to me there is a very broad distinction which * * * will warrant not only this exception * * * but a great deal of other legislation which we enact * * * relating to the matter of labor." (21 Cong. Rec. 2728). (Italics supplied)

He proceeded to distinguish between a "mere commercial transaction" and labor, which touches the "Government and the character of the state itself". And he said, further

> "when we are dealing with one of the other classes the combinations aimed at chiefly by this bill, we are dealing with a transaction, the only purpose of which is to extort from the community, monopolize, segregate and apply to individual use for the purposes of private greed, wealth which ought properly and lawfully and for the public interest *to be generally diffused over the whole community.*" (21 Cong. Rec. 2728) (Italics supplied)

Later, in answering a question put by Senator Platt, he said that he spoke

> "to point out what I thought the Senator from Vermont (Edmunds) failed to appreciate thoroughly, *the distinction between the associations of laborers and this class of cases at which this bill aims.*" (21 Cong. Rec. 2729). (Italics supplied)

Shortly thereafter, Senator Walthall moved to refer the bill to the Judiciary Committee, and by a vote of 31 "Yeas" and 28 "Nays", the bill was referred to the Judiciary Committee. (21 Cong. Rec. 2731).

It is clear from the *course of the debate* up to this point that:

1. There was general agreement that the evil to the nation emanated from the trusts;

2. The bill, because of its emphasis upon articles of growth, production, manufacture and prices, necessarily included farmer groups and labor unions;

3. Farmer groups and labor unions constituted no threat to the national well-being;

4. The intention of the Senate was to draft a bill which would efficiently and vigorously attack the trusts and not labor unions and farmer groups;

5. Senator Sherman's proviso was adopted by the Senate sitting as a Committee of the Whole, to specifically exclude labor unions and farmer groups.

6. In all references by the Senators to the groups endangered by this bill, the farmer groups were coupled with the labor groups.

7. The bill was referred to the Judiciary Committee solely for the purpose of devising a constitutionally valid law, which would be directed against trusts and not against anything else.

(b) The Debate in the Senate on the Bill Reported out by the Committee on the Judiciary

On April 8, 1890, *Senator Hoar*, a member of the Judiciary Committee, of which Senator Edmunds was Chairman, obtained unanimous consent "that the trust bill be taken up". (21 Cong. Rec. 3145). The Judiciary Committee had stricken out all language after the enacting clause and promulgated a substitute bill and offered it as an amendment. (21 Cong. Rec. 3145). *The bill proposed by Senator Hoar became the "Sherman Act" as we know it.* Senator Sherman, who had offered the amendment expressly excluding labor groups and farmers' organizations, which was adopted by the Senate, (21 Cong. Rec. 2612), said he had fairly and fully considered the amendment offered by the Judiciary Committee and would vote for it. (21 Cong. Rec. 3145). The amendment was agreed to by the Senate, sitting

as a Committee of the Whole and then reported to the Senate. Senator Reagan suggested an amendment to permit suits in state courts under Section 7 (21 Cong. Rec. 3146). Senator Hoar, *who was in charge of the bill* and who had previously spoken so eloquently on behalf of farmers' groups and labor organizations in reply to Senator Edmunds, (21 Cong. Rec. 2728), described the bill as "undertaking to curb by national authority *an evil*, * * *". (All Senators who spoke on the original bill and the amendments, referred to the trusts as the evil which had beset the nation.) Senator Hoar, in explaining this bill, stated that the evil was

> "these great monopolies which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are a menace to republican institutions itself * * *"

And further, that the bill, which was sent to the Judiciary Committee, was

> "exceedingly crude *in this matter*",

and that the Judiciary Committee had agreed upon

> "what we believe will be a very efficient measure, under which one long forward step will be taken in suppressing *this evil*". (Italics supplied)

He followed this remark by this carefully worded statement,

> "We have affirmed the *old doctrine of the common law* in regard to all interstate and international *commercial transactions*." (21 Cong. Rec. 3146) (Italics supplied)

Senator George, also a member of the Judiciary Committee, and who had argued that legislation to curb the

trusts was demanded by the people and that such legislation should be carefully drafted so as to strike at the trusts only, said of the new bill,

> "It covers professedly *a very narrow territory*, leaving a large number of these institutions, *these trusts*, or whatever we may call them, entirely without the purview of the bill." (Italics supplied)

He then argued for the Reagan amendment so that "the wretched victims" who are oppressed by "*these great combinations*" might join in one class suit to recover the damages they might sustain. To illustrate the necessity for this, he referred to the financial inability of "*small farmers*" to go to a distant town, employ a lawyer and sue one of *these great trusts*. (21 Cong. Rec. 3147-3148).

Senator Edmunds, the Chairman of the Judiciary Committee, in speaking against any such amendment for fear that the bill would be rendered invalid and

> "that it was entirely inadmissible for the purposes of *the very people* who are concerned in it,"

continued by pointing out that

> "if I were a lobbyist of some of *these trusts and combinations that are affected by this bill*,"

he would seek to break it down; and further

> "if we were really in earnest in wishing to strike at *these evils* broadly in the first instance as a new line of legislation * * * we should make *its definitions out of terms that were well known to the law already*, and would leave it to the courts in the first instance to say how far they would carry *it or its definitions* as applicable to each particular case as it may arise. I should hope that the Senate of the United States, being in

earnest about *this business* would allow us to pass a bill that is *clear in its terms, is definite in its definitions and is broad in its comprehension* * * *" (21 Cong. Rec. 3148). (Italics supplied)

And further, in explaining the framework of the bill,

"It provides, fourth, that on the part of the United States defending *all small people* * * *" (21 Cong. Rec. 3149). (Italics supplied)

Senator Morgan then said,

"I should be satisfied with this bill * * * as a bill that would cover *the evil* * * *" (21 Cong. Rec. 3149). (Italics supplied)

Senator George continued to argue for his amendment to permit class suits in state courts on behalf of

"the poor, unlettered and unskilled American *farmer* and American *mechanic* and American *laborer*, who are the great sufferers by these *trusts and combinations*."

He viewed Section 7 of the bill as a snare and delusion

"so far as a remedy *to the real parties injured by these trusts* is concerned." (21 Cong. Rec. 3149-50). (Italics supplied)

The Reagan and George Amendments to strengthen the civil remedy section were defeated on the ground that the Congress could not empower the state courts to entertain suits for penalties for violation of federal laws and because, as Senator Hoar pointed out, one state court could not render a judgment for a penalty for acts committed in another state. (21 Cong. Rec. 3150).

Senator Kenna then asked about the scope of the word "monopoly". Edmunds replied that it had the meaning "as the courts apply it". (21 Cong. Rec. 3151). In answer to the specific illustration of a man who by his skill and intelligence became the sole or dominant dealer in a particular commodity, Senator Edmunds replied that he has no monopoly at all, "he has not bought off his adversaries". (21 Cong. Rec. 3152.)

Senator Hoar then broke in and said:

> "that monopoly is a *technical term known to the common law*, * * * It is the sole *engrossing* to a man's self by means which prevent other men from engaging in *fair competition with him.*"

He continued on to explain a monopoly granted by the King was a direct inhibition of all other persons to engage in that business or calling. He supposed that the illustration offered by Senator Kenna was not a monopoly, because monopoly

> "involved something like the use of means which made it impossible for other persons to engage in fair *competition*, like the *engrossing*, the buying up of all other persons engaged *in the same business.*" (21 Cong. Rec. 3152). (Italics supplied)

Senator Kenna asked whether such a monopoly as described by Senator Hoar was bad at common law, and upon receiving a reply from Senator Hoar that it was, asked then "why pass a bill to denounce it"? Senator Hoar replied, *that there is no common law of the United States* and that

> "The great thing that this bill does, except affording a remedy, is to extend *the common law principle*

which protected *fair competition in trade in old times in England* to international and interstate commerce in the United States." (21 Cong. Rec. 3152). (Italics supplied)

ereupon, Senator Edmunds read a dictionary definition "monopoly" and said

"So I assure my friends that although we may be mistaken * * * we thought we had done the right thing, in providing in the very phrase we did, that if one person, instead of two, by a combination, if one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interest as if two had combined to do it." (21 Cong. Rec. 3152).

The amendment by the Judiciary Committee was put to vote and concurred in. It was read a third time and passed ally by a vote of Yeas, 52, Nay, 1, Absent, 29. The title as then amended to read, "A Bill to Protect Trade and ommerce against Unlawful Restraints and Monopolies". 1 Cong. Rec. 3153).

No reference was made to the possible application of the ll to labor or farmer organizations. This possibility was t referred to during the course of the debate in the ouse. The reason for this is plain, and that is that the *l common law principles* which protected fair competition d trade *in old times in England*, could not be deemed to brace labor unions or farmer groups. Having clearly pressed themselves on this point throughout the entire urse of the debate, the only question in the minds of the gislators was whether or not the measure was

"well constructed to restrain the undesirable activities

of business combinations." See *Berman: Labor and the Sherman Act* (1930).

Chief Justice White, who, as we have seen, contended in his dissenting opinion in the *Freight Association Case* that to read the rule of reason out of the statute resulted in embracing every contract or combination of workers, said:

> "The debates * * * conclusively show that the main cause which led to the legislation was the thought that it was required by the economic conditions of the times, that is, *the vast accumulations of wealth in the hands of corporations and individuals*, the enormous development of corporate organizations, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and *injure the public generally*." (Italics supplied)

Standard Oil Case, 221 U. S. 1, 50.

We respectfully submit, therefore, that on the point of legislative intent, the statement by Chief Justice Fuller in *Loewe v. Lawlor*, *supra*, that "the Act made no distinction between classes" is decisively proved to be error, and that his conclusion that the legislation did not exempt organization of farmers and laborers was wrong.

4. Labor Unions in their Relations with Employers Were not within that Field of Common Law which Dealt with Combinations in Restraint of Trade

We have already seen that,—under the common law construction of the terms of art used in the statute, to defi-

he essential evil at which the statute was directed,—labor nions did not come within those terms. Holmes, J. in *Northern Securities Case, supra;* White, J. in *Freight Association Case, supra;* Taft, J. in *Addyston Case*, 85 F. 71.

One further observation may be made. In *Loewe v. Lawlor, supra*, Chief Justice Fuller adopted the opinion of Judge Billings in *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994 (C. C. E. D. La. 1893)*.

In that opinion, Judge Billings utilized the decision in *People v. Fisher*, 14 Wend. 9 (1835). But Chief Justice Shaw had clearly pointed out in *Commonwealth v. Hunt*, 45 Mass. 111, 135 (1842) that this decision

> "was founded on the construction of the revised statutes of New York, by which this matter of conspiracy is now regulated. It was a conspiracy by journeymen to raise their wages, and it was decided to be a violation of the statutes, making it criminal to commit any act injurious to trade or commerce. It has, therefore, an indirect application only to the present case."

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*No mention was made of Judge Putnam's opinion in United States v. Patterson, 55 Fed. 605 (C. C. D. Mass. 1893) in which he terms of the statute were given their common law meaning. aid Judge Putnam:

> "The second section is limited by its terms to monopolies and evidently has as its basis the engrossing or controlling the market. The first section is undoubtedly in pari materia, and so has as its basis the engrossing or controlling of the market, or of lines of trade."

le said further,

> "* * * if the proposition made by the United States is taken with its full force, the inevitable result will be that the Federal Courts will be compelled to apply this statute to all attempts to restrain commerce * * * by strikes or boycotts and by every method of interference by way of violence or intimidation." (p. 641)

The doctrine, selected by Judge Billings, had been carefully analyzed by Judge Daly in *The Master Stevedores' Association v. Walsh*, 2 Daly 1 (N. Y. 1867) and after review of the authorities relied on in *People v. Fisher*, *supra*, he showed that one of them was based on the English statutes regulating wages, (*The King v. Journeymen Tailors of Cambridge*, 8 Modern 11); and that the other was a criminal conspiracy to raise the price of ale by inciting the poor to commit acts of violence against the excisemen. (*The Tub Women v. The Brewers of London* probably *The King v. Sterling*, 1 Lev. 125; 1 Sid. 274; 1 Keb. 350).

Judge Taft referred to the opinion of Lord Campbell, C. J. in *Hilton v. Eckersley*, 6 El. & Bl. 47, 66 (1855); the opinion of Hannen, J. in *Farrer v. Close*, L. R. 4 Q. B. 602, 612 (1869); and *Hornby v. Close*, L. R. 2 Q. B. 153, (1867) in support of the proposition that what was void at common law because in restraint of trade, was not illegal in any other sense. An analysis of these cases and opinions will show that the subject matter there involved could not have been taken up by the Sherman Act.

In *Hilton v. Eckersley*, *supra*, a group of textile manufacturers combined for the purpose of resisting wage demands of the labor unions, and to effectively achieve this objective subjected the control of their business, to the will of the majority. Faithful performance of this agreement was secured by bond. The action was on the bond. The plea in defense was that the bond was against public policy, in that it was in restraint of trade. The bond was held in restraint of trade, and therefore void. Opinions were delivered seriatum. Lord Campbell, C. J. and Crompton, J. delivered opinions in favor of the defendants, whereas Erle, J. delivered an opinion for the plaintiff.

Since Judge Taft referred particularly to the opinion

of Lord Campbell, C. J., and since that opinion deals with the legality of combinations of workers, we must infer that Judge Taft intended to point out that a combination of workers to raisg their wages and improve their conditions, was not criminal at common law. Lord Campbell said:

> "But I cannot bring myself to believe, without authority much more cogent, that, if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor and liable to be punished by fine and imprisonment. The object is not illegal; and, therefore, if no illegal means are to be used then there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high, and I cannot understand why in the one case workmen may be considered as guilty of a crime in trying by lawful means to raise them, or masters in the other can be considered guilty of a crime in trying by lawful means to lower them." 6 El. & Bl. 62, 63.

The opinion of Alderson, B., 6 El. & Bl. 66, affirming the decision below, is also significant on this point. He said:

> "We think that the legislature have been contented to make such strikes not punishable; and certainly, they never contemplated them as being the subject of enforcement by a suit at law on the part of the body of delegates against any workman who might have been seduced by some designing person to sign an agreement with penalty and to continue in the strike as long as a majority were for holding out." (pp. 76-77)

In *Hornby v. Close*, *supra*, an information was lodged

by the president of the Bradford Branch Society of the United Order of Boilermakers and Iron Shipbuilders on behalf of the Society, against Charles Close, a member, charging him with refusal to give up monies of the Society which he had in his possession, contrary to the Friendly Society Statute (18 & 19 Vict. C. 63, S. 9). It was contended for the defendant that the Society was not a society within the meaning of Section 44 of the statute, and further, that the purposes of the society were illegal, being against public policy, in restraint of trade, because by the rules of the union workmen were deprived of the free exercise of their own will in employment, strikes were encouraged by the payment of strike benefits and fines were imposed for obtaining work for non-members.

The magistrate dismissed the action on the ground that he had no jurisdiction. Opinions were delivered seriatim by Cockburn, C. J., Blackburn, Mellor, and Lush, JJ.

Cockburn held that the Society was in fact a trades union and therefore "did not come within the operation of the Friendly Society Act so as to give the magistrate jurisdiction". He assigned two reasons as the grounds for his decision as follows:

> "Therefore, for these two reasons, we hold the present society not within S. 44; first because it is for a purpose not analogous to that of a benevolent or friendly society such as is mentioned in S. 9; and secondly, because those rules, although they may not be illegal in the sense of bringing the parties to them within the criminal law, are in restraint of trade and so far illegal * * * I am far from saying that the members of a trades' union constituted for such purposes would bring themselves within the criminal law, but the rules of such a society would certainly operate in re-

straint of trade and would therefore, in that sense, be unlawful." (p. 159)

He, as well as Blackburn, J. relied upon *Hilton v. Eckersley, supra*. Blackburn, J. said:

> "I do not say the objects of this society are criminal. I do not say they are not. But I am clearly of the opinion that the rules referred to are illegal in the sense that they cannot be enforced; and on this ground also, I think the society not within S. 44 as not being 'for a purpose not illegal'." (p. 159)

The sole issue in this case was whether or not the Friendly Society Statute would afford protection to a trades' union under the language of S. 44 of the statute, against members or officers who embezzled funds of the union. S. 44 of the statute afforded protection only to

> "a friendly society established for any of the purposes mentioned in S. 9 or for any purpose *which is not illegal*."

The decision turned on the scope of the word "illegal" as it appeared in S. 44. The Justices held that the term "illegal" as used in the statute, was broad enough to include purposes which were merely void and was not limited to purposes which were illegal in the sense that they were criminal.

The same problem was involved in *Farrer v. Close, supra*. It is significant that Judge Taft, in the *Addyston case*, 85 F. 271, referred to the opinion of Hannen, J. particularly. In that case, the information was dismissed by the magistrate, and that action was affirmed because the court was evenly divided. Cockburn, C. J. and Mellor, J. deemed the case of *Hornby v. Close, supra*, controlling, and

said that the society was not entitled to the advantage of the statute, but

> "in case of any misappropriation of its funds, must be left to its ordinary legal remedies".

Hannen, J. argued that strikes were not necessarily illegal, and that public policy did not compel the condemnation of strikes. He said in answer to the argument that aiding strikes and paying members not to go to the struck plant, is contrary to public policy as follows:

> "By the expression that a thing is contrary 'to public policy' I understand that it is meant that it is opposed to the welfare of the community at large. I can see that the maintenance of strikes may be against the interests of employers, because they may be forced to yield at their own expense, a larger share of profit or other advantage to the employed; but I have no means of judicially determining that this is contrary to the interest of the whole community; and I think that in deciding that it is, and therefore, that any act done in its furtherance is illegal, we should be basing our judgment not on recognized legal principles, but on the opinion of one of the contending schools of political economists." (p. 613)

Hayes, J., in his opinion for reversal, stressed the same principles enunciated by Hannen, J.

The pointed references by Judge Taft in the *Addyston Case*, *supra*, to the opinion of Hannen, J. in *Farrer v. Close*, *supra*, was undoubtedly made to show that the doctrine of *People v. Fisher*, was not the law of England in 1867. It certainly was not the common law doctrine in the United States and, in 1890, it had already passed out in England

(Act of 1875). See Landis: *Cases on Labor Law, Historical Introduction*, p. 24.

The case of *Snow v. Wheeler*, 113 Mass. 179 (1873), is significant confirmation that this was the state of the law in the United States. In that case, union officers brought a bill in equity to compel the union trustees and a bank to pay over to the union the funds of the union on deposit in the bank. The trustees defended on the ground that the purposes of the union were in restraint of trade since, inter alia, the by-laws of the union prohibited the members from giving instruction to apprentices, except upon permission obtained from the union, and also provided for the support of strikes. The evidence before a special master indicated that these purposes of the union were being carried out.

The Court held for the plaintiffs, and said (pp. 185-186)

> "It is insisted that the agreements thus established between the members of the order are in unlawful restraint of trade, and therefore illegal as being against public policy. But in the opinion of the Court, the point is not well taken."

The opinion goes on to disclose situations in which "an attempt by one side to increase wages by diminishing competition" is not in restraint of trade.

Note that the facts in this case were similar to the facts in the *Close Case, supra*.

That the Sherman Act does not by its terms include labor unions is clear when we consider the fact that the terms thereof, in their historical sense, were applied to persons engaged in competitive business relations only, and that the public policy underlying the rule rendering them void

and unenforcible was, as Tindal and Blackstone said, to prevent concentration of capital power in the hands of the few. When we consider the purpose of a labor organization, it becomes clear that it does not operate against the public interest, does not monopolize the business, does not permit concentration of wealth in the hands of a few men, but on the contrary, seeks to compel businessmen and employers to distribute the gains from business in the form of wages and other benefits, into the hands of the workers and through them to be more widely diffused throughout the community.

It is therefore respectfully submitted that the Sherman Act

(a) Does not, by its terms, apply to labor unions, and that this is harmonious with the legislative intent.

(b) That the Court was in error in applying the Act to the labor union in *Loewe v. Lawlor*, 208 U. S. 274.

The foregoing argument is independent of any consideration of Section 6 of the Clayton Act. A consideration of the history of the period immediately preceding and accompanying the passage of the Clayton Act and of the mischief to be remedied, as well as the general trend of debate on Section 6 of the Clayton Act in the Congress, sanctions the conclusion that Congress meant to undo the decision of the Court in *Loewe v. Lawlor*. Although the Court adhered to the doctrine of *Loewe v. Lawlor* in *Duplex v. Deering* and in *Bedford Cut Stone Co. v. Journeymen Stonecutters Association*, 274 U. S. 37, the Court should nevertheless overrule a construction of the Sherman Act which makes that statute applicable to labor unions with respect to their relations to employers.

5. *To Obviate the Judicial Construction of the Sherman Act in Loewe v. Lawlor, Congress Enacted Section 6 and Section 20 of the Clayton Act*

We will not enter into an exhaustive analysis of the course of the debates on this Act. The debates appear in 51 Congressional Record. Section 6 of the Clayton Act is as follows:

> "Sec. 6. *That the labor of a human being is not a commodity or article of commerce.* Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; *nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.*" (Italics supplied)

When this section was reported to the House by the Committee, it did not contain *either the last clause or the first sentence.* The last clause was adopted by the House and the first sentence by the Senate. The debates in the House which preceded the adoption of the last clause are therefore of no value in ascertaining the general agreement on purpose with relation to the last clause. And similarly, the debates in the Senate which preceded the adoption of the first sentence are of no aid in ascertaining the general agreement on purpose with respect to that sentence. Thus, for example, Representative Floyd of Arkansas, said,

> "We are taking them out from the ban of the pres-

ent law to the extent that in the future they cannot be dissolved as unlawful combinations. Their existence is made lawful and they are given a legal status." (51 Cong. Rec. *9160*).

But this statement was made before the last clause was even before the House. The House added the last clause, called the Webb Amendment, to perfect the section on the demand that without it, the section would not fulfill its intended purpose of exempting labor unions from the application of the Sherman Act. The course and general trend of the debates in the House confirm this. See statements of Representatives and *particularly the statement of Rep. Henry, Chairman of the Rules Committee because he was really the author and sponsor of the clause.* He said,

> "In my judgment, when Congress was dealing with 'combinations in restraint of trade' it never intended that the law should apply to labor organizations or farmers' organizations without capital and not for profit. *The courts took a different view of it and construed the Act as it was never intended that it should be interpreted * * * We are now about to correct that error, and make it plain and specific, by clear cut and direct language that the Anti-Trust Laws against conspiracies in trade shall not be applied to labor organizations and farmers' unions.*" (51 Cong. Rec. 9540) (Italics supplied)

Many Representatives, throughout the discussions, joined Representative Henry in declaring that at last the grave error was to be corrected in language which could not be misunderstood. See statements of Konop, 51 Cong. Rec. 9545; Quinn at 9546; Towner, at 9548, Barkley at 9553

Crosser at 9556; Casey at 9557; Lewis at 9565; LaFollette at 9573."

The Webb Amendment was adopted by a vote of 207, *and no nays.* (51 Cong. Rec. 9567). The bill was adopted by the House and went to the Senate. The Senate Judiciary Committee reported Section 6 practically in the same form as it was passed by the House.

The Senate added the first sentence *to make even more certain that the Sherman Act could not be applied to labor unions and farmers' organizations.* The first sentence is

> "That the labor of a human being is not a commodity or article of commerce."

This was known as the Culbertson Amendment. It appears in 51 Cong. Rec. 14590. It was deliberately written in on the theory that this would remove labor unions from the field of federal power. That sentence appeared in an amendment offered by Senator Cummins because he believed that the last clause of the section did not accomplish the intended purpose. (51 Cong. Rec. 14585). His amendment was defeated but Senator Culbertson, Chairman of the Judiciary Committee, proposed that this famous first sentence be added to the section and this was done. (51 Cong. Rec. 14610).

In *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, the Court construed Section 6 of the Clayton Act, and held that all it meant was that the anti-trust laws should not be construed to forbid members of such organizations

"from lawfully carrying out their legitimate objects". Cf. *Senate Report No. 698*, 63rd Congress, 2nd Session, at p. 46.

The Court relied upon *Loewe v. Lawlor* as authority that a secondary boycott which directly involved interstate sales is within the Sherman Act. Having placed the activity there involved in the niche of secondary boycotts, directly involving interstate commerce, the Court, without considering the substantive problem as to whether there was a "combination or conspiracy in restraint of trade", found a violation on a mere finding of jurisdiction. The Court did not "stick to the exact words used," (Cf. Holmes, J., in the *Northern Securities Case*) but said that the prohibition of the Sherman Act

> "must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law * * *". (p. 466)

Cf. *Standard Oil Case*, *supra*, in which the broad construction of the Act to include more than the common law meaning of "combinations in restraint of trade" was rejected, and in which the *Freight Association and Joint Traffic Cases*, in this respect, were expressly "limited and qualified" (pp. 67 68); and also *Cline v. Frink*, *supra*; *Lanzetta v. New Jersey*, 306 U. S. 451, 453.

*The construction of Section 20 of the Clayton Act given by the Court does not concern us now because, as this Court said in The New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 562; the Norris-LaGuardia Act, (Act of March 23, 1932, C. 90, 47 Stat. 70; 29 U. S. Code, Section 101, et seq.), "obviated the results of judicial construction" of that section and "rendered specifically described conduct lawful". Lauf v. Shinner, 303 U. S. 323. See also Senate Report No. 163, 72nd Congress, First Session; House Report No. 669, 72nd Congress, First Session.

The dissenting opinion of Brandeis, J. in the *Duplex* ase did not deal with the propriety of this construction, it met the issue, as it was presented by the majority, as e of private tort law and stated a vigorous justification bring the case within the rule of reason.

Again, in the *Stone Cutters Case, supra*, decided *April 1927*, the majority relied upon the broad construction the Act. The case of *Cline v. Frink* was decided on *ay 31, 1927* and in it the court said that the terms of the t must be held to their common law meaning.

In every case involving the Sherman Act, there are two oblems involved, one of jurisdiction and the other of bstance. The failure to differentiate these two problems stinguishes most of the significant labor cases decided the Court.

Is it the law that the Sherman Act shall receive a broad nstruction, if a labor union is involved, and a narrow mmon law interpretation if a business combination is volved? The evidence disclosed by a review of the cases ems to lead to that conclusion.

It is respectfully submitted however that the statute ould not be differently construed dependent upon the kind defendant involved. The statute should be held to its mmon law meaning in all cases and under such construc- n, labor unions are not within the statute and the de- ndant union in this case cannot be held liable under it.

B. Even if the Sherman Act Is Applicable to Labor Unions, and their Activities, that Act Has Not Been Violated by the Respondents because the Local Strike Activities Were Not Part of a Conspiracy directly Aimed at Interstate Commerce nor Vitalized by an Intent To Monopolize the Supply of the Article Entering and Moving in Interstate Commerce or To Fix the Price of it in Interstate Markets

This contention is made independently of the foregoing argument and is unqualifiedly supported by all of the former decisions. The "secondary boycott" cases are not apposite here. In *Loewe v. Lawlor*, 208 U. S. 274, the decision was on the bill of complaint and demurrer. The gist of the case was that there was a conspiracy which embraced the entire field of the manufacture of fur hats in the United States, and its alleged purpose was to compel unionization of all of the factories so that the union could subject them to its control, and further, that the

> "conspiracy or combination was so far progressed that out of eighty-two manufacturers of this country * * * seventy had accepted the terms." (p. 305)

On the second appeal in this case, *Loewe v. Lawlor*, 235 U. S. 522, Holmes, J. said,

> "The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor, * * * that *in pursuance of a general scheme* to unionize the labor employed by manufacturers of fur hats *(a purpose previously made effective against all*

but a few manufacturers) * * * the defendants caused * * * a boycott." (p. 533)* (Italics supplied)

The circulation of the unfair list and the secondary boycott was in aid of the general scheme. The same view was preserved in the *Duplex Case* and the *Stone Cutters Case*. But the effect on these cases of the Norris-LaGuardia Act has already been discussed and it is now beyond dispute that the activities of the unions in those cases have been rendered lawful.

Local Activities of Employees on Strike Are not within the Reach of the Federal Power

The facts of this case establish that there occurred a sit-down strike in the petitioner's mill. The case is squarely within the decisions of this Court in the *First Coronado Coal Case*, 259 U. S. 344; *United Leather Workers v. Herkert & Meisel*, 265 U. S. 457; and *Levering & Garrigues v. Morrin*, 289 U. S. 103.

In the *First Coronado Coal Case* this Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such and that the activities there involved—a local strike—did not bring them within the broad provisions of the Anti-Trust Act. Chief Justice Taft found that the strike there involved was

> "local in its origin and motive, local in its waging, and local in its felonious and murderous ending." (p. 412)

*In Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 465, the court pointed out that "the conspiracy * * * was held to fall within the Federal Anti-Trust Act because it was aimed at the destruction of the interstate trade in the manufactured hats."

In *United Leather Workers v. Herkert & Meisel*, 265 U. S. 457, the Court rejected a claim that the strike there involved and carried on through illegal picketing and intimidation of workers was in violation of the Anti-Trust Act, despite the fact that 90% of the output of the plant was normally shipped in interstate commerce and pointed out that the natural, logical and inevitable consequences of the contention there made (similar to that of the petitioner here)

> "will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction, provided any appreciable amount of its product enters into interstate commerce * * * We cannot think that Congress intended any such result in the enactment of the Anti-Trust Act, or that the decisions of this Court warrant such construction."

This Court held in that case, at p. 471, that there was no such intent as is required to make out a violation of the Anti-Trust Act nor were the necessary effects upon interstate commerce such as

> "to enable those preventing the manufacture to monopolize supply, control its price, or to discriminate as between would-be purchasers."

The Court held further, p. 471, that

> "the mere reduction in the supply of an article to be shipped in interstate commerce by *illegal or tortious prevention of its manufacture* is ordinarily an indirect and remote obstruction to that commerce." (Italics supplied).

See also *Levering & Garrigues v. Morrin*, 289 U. S. 103 and *Industrial Association v. United States*, 268 U. S. 64.

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, this Court reviewed the labor cases which involved the Anti-Trust Act, to show the breadth of the federal power under the commerce clause and the conditions under which the federal power had been exercised with relation to the activities of employees engaged in production, and in this connection, said:

"Upon the same principle, the Anti Trust Act has been applied to the conduct of employees engaged in production. *Loewe v. Lawlor*, 208 U. S. 274, *Coronado Coal Co. v. United Mine Workers, supra; Bedford Cut Stone Co. v. Stonecutters Association*, 274 U. S. 37. See, also *Local 167 v. United States*, 291 U. S. 293, 297; *Schechter Corporation v. United States, supra.* The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus, in the *First Coronado Case*, the Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such, and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the broad terms of that statute. A similar conclusion was reached in *United Leather Workers v. Herkert, supra, Industrial Association v. United States, supra*, and *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 107. But in the *First Coronado Case*, the Court also said that 'if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.' 259 U. S. p. 408. And in the *Second Coronado Case* the Court ruled that while the mere reduction in the sup-

ply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.' 268 U. S. p. 310. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct. *Industrial Association v. United States*, 268 U. S. p. 81. What was absent from the evidence in the *First Coronado Case* appeared in the *Second* and the Act was accordingly applied to the mining employees." (pp. 39-40). (Italics supplied)

This Court referred to those cases where the Anti-Trust Act had been applied *merely to show that the federal power had been deemed broad enough to include local activities but only when they were part of a conspiracy with intent to restrain or control the supply or to fix prices in interstate markets.*

In the *Second Coronado Coal Case*, 268 U. S. 295, this Court held that the additional evidence produced in the second trial showed an intent "to restrain and control the supply of coal moving in interstate commerce," and applied the Anti-Trust Act to the conspirators. *It was the suppression of competition in the interstate markets for the purpose of maintaining prices which constituted the conspiracy in restraint of commerce and not the violent strike activities which brought the Anti-Trust Act into play in that case.*

In distinguishing the *First Coronado Case*, the Court aid,

"The purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines * * *".

nd further,

"In the view we took of the evidence then before us we had only the isolated circumstances of the reduction in shipment of the normal product of the four mines destroyed, without other evidence to show an actual intent and plan on the part of the defendants thereby to restrain interstate commerce * * *" (pp. 309, 310).*

In the case at bar the requisite intent was *neither alleged*. . pp., 11, 21-22), *nor proved*. There was nothing more than ncerted action to unionize the mill by means of a sit-down ike with the intent and purpose of preventing the petiner from carrying on its business. As this Court said in *Herkert Case*.

"It is true that they were, in this labor controversy,

*In Santa Cruz Case, supra, the Court commented on the Second Coronado Case, to show that the federal power does extend and reach labor disputes if they constitute a source of injury interstate trade and said,

"And in the Second Coronado Case (1925), 268 U. S. 295, 310, the Court held that the evidence was adequate to show that the purpose was to stop the production of non-union coal and prevent its shipment to markets of other states, and that a combination to that end would constitute a direct violation of the Anti-Trust Act." (p. 465)

hoping that the loss of business in *selling* goods would furnish a motive to the complainant to yield to demands in respect to the terms of employment." (Italics supplied)

It is respectfully submitted that the facts in this case do not make out a violation of the Sherman Anti-Trust Act and therefore the district court had no jurisdiction.

2. The Jury Did not and Indeed Could not Find the Requisite Intent. The Jury Found an Intent To Conduct a Sit-down Strike

The Circuit Court of Appeals in reversing the judgment entered in the District Court committed no error. Sufficient has been said herein to show that there was no conspiracy with intent to monopolize the supply of hosiery entering and moving in interstate commerce or to fix the price of it in the interstate markets. The case was presented to the jury on the erroneous theory that the intent to conduct a sit-down strike in a mill which normally receives raw materials from outside the state and ships 85% of its merchandise into other states raises a conclusive presumption of intent "to restrain commerce". No proof was adduced of a conspiracy with intent to unduly restrict competition in interstate hosiery markets by monopoly of supply or by price fixing, nor were the consequences of the sit-down strike such as to compel an inference of such intent.

The Apex Hosiery Company produced about 100,000 dozen pairs of hosiery per month, in an industry which had a total national sale in the year 1937 of approximately forty million dozen pairs of hosiery, and which industry had at that time a productive capacity of about forty-eight

million dozen pairs. The stoppage of production at Apex for the period of the sit-down strike had no effect whatsoever upon competitive opportunities in the hosiery markets, or the prices of hosiery in interstate markets, nor was the available supply of hosiery curtailed whatsoever. As a matter of fact, more hosiery was sold during 1937 than during 1936. (R. 1261).

It is plain therefore that "the combination was not such that by reason of the intent of the conspirators or the inherent nature of their acts, *public interest was prejudiced by unduly restricting competition or obstructing trade. Appalachian Coals, Inc., supra. Nash v. United States, supra.*" (R. 1413, Opinion of Circuit Court). (Italics supplied)

The petitioner contends however that the refusal by the respondent Leader to permit entry into the mill for the purpose of removing hosiery so that it could be shipped against orders constitutes the crucial fact of sufficient substance to turn the entire case into a conspiracy "in restraint of commerce".

Although the petitioner, states that the union respondent repeatedly refused to grant the petitioner's request for permission to remove and ship $800,000 of *finished merchandise* from its factory, the record does not support that statement. The record shows that there was on hand in the plant on May 6, 1937, the date of the beginning of the strike, a total of 130,000 dozens of *finished and unfinished* merchandise (R. 145). *Of this, only 25,452 dozens were finished.* (R. 518). Furthermore, the respondent Leader, not the union, uttered the refusal (R. 620). There is no evidence that the union actually authorized the alleged statement of refusal or ratified Leader's alleged refusal, or that it had actual knowledge of it. (Section 6 of *Norris-LaGuardia Act*).

However, it is clear that this is not a violation of the Anti-Trust Act.

In the *First Coronado Coal Case*, the following appears at p. 411:

> "The circumstances that a car loaded with coal and billed to a town in Louisiana was burned by the conspirators has no significance upon this head. The car had been used in the battle by some of Bache's men for defense. It offered protection and its burning was only a part of the general destruction."

See also *Industrial Association of San Francisco v. United States*, 268 U. S. 64, referred to in the opinion of the Circuit Court below at R. 1414.

If it is not a violation to engage in unlawful picketing to prevent the normal operations of a factory which customarily ships 85% of its product into other states, and if it is not a violation to burn a "car loaded with coal and billed to a town in Louisiana", then surely the refusal by Leader does not constitute a violation. It cannot be said that this refusal by Leader prejudiced the public interests by unduly restricting competition or unduly obstructing the course of trade; *Sugar Institute, Inc. v. United States*, 297 U. S. 553; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344.

Moreover, the damages the petitioners sought to recover did not result from this refusal. The petitioner sought to recover damages for injury to its property, loss of overhead charges and estimated profits it claimed it would have earned had it operated its plant. *It did not prove any loss resulting from the refusal.*

But, more fundamentally than this, since this is an action

for damages under the Act, the burden is upon the petitioner to prove:

(a) That there has been a violation of the Anti-Trust Act; and

(b) That the damages which it sustained resulted proximately from the violation.

It must be made clear at the very outset that an action under Section 4 of the Clayton Act or Section 7 of the Sherman Act differs from a common law action for injuries sustained by reason of a wrongful act, and that obviously the recovery permitted is limited to such damages which result proximately from the forbidden acts.

If the plaintiff has been injured, but not by reason of anything forbidden in the Anti-Trust Act, he cannot recover under this Section. Manifestly, for the injury which it has sustained, the plaintiff may recover under the local laws and in the proper forum, but it cannot utilize the Sherman Act and make it a substitute for the appropriate action available to it.

In an action for treble damages for violation of the Anti-Trust Act, the declaration itself must allege facts from which the court can determine that there has been a violation of Section 1 or Section 2 of the statute, with resultant damage proximately caused thereby, to the plaintiff.

The test of a violation of the Anti-Trust Act, as we have seen, is whether or not the combination or conspiracy was carried on with the intent or necessary effect of monopolizing the supply of the commodity moving in interstate commerce, or fixing prices of the commodity in interstate markets. The only kind of damage which can proximately result from such a combination, contract or conspiracy is

such as would prevent the individual, seeking to recove damages, from purchasing goods upon the market becaus of the monopoly of supply, or at prices which, had they n been fixed by the conspirators, would have permitted th plaintiff to conduct his business at a profit.

The damages which the Apex Company seeks to recove in this case are not the special kind of damages contem plated by the Act. The damages which the petitioner seek to recover in this case are such as resulted from a trespas under the common law, and to recover them the petitione may bring an action in the state courts.

In *Wilder Manufacturing Co. v. Corn Products Compan* 236 U. S. 165, the Court said:

> "Founded upon broad conceptions of public policy the prohibitions of the statute were enacted to preven *not the mere injury to an individual which would aris from the doing of the prohibited acts; but the harm to the general public which would be occasioned by th evils which it was contemplated would be prevente* and hence, not only the prohibitions of the statute, bu the remedies which it provided were co-extensive wit such considerations." (Italics supplied)

The petitioner is obviously trying to convert acts which are local offenses into crimes under the Sherman Act. See *Nash v. United States*, 229 U. S. 373.

Returning to the petitioner's contention that the Circui Court erred in reversing because the jury found intent and such finding is amply supported by the evidence.

It is abundantly clear that the evidence supports no find ing of the requisite intent. And it is equally true that th

jury made no such finding. The following is ample proof of this unequivocal statement:

(a) The case was tried upon the erroneous theory propounded by the petitioner and adopted by the Circuit Court in its former opinion reported in *Apex v. Leader*, 90 F. (2d) 155, that *a sit-down strike raises a conclusive presumption of an intent to restrain commerce.*

(b) The learned Trial Judge refused to charge the jury in accordance with the defendants' points for charge as to the meaning of "restraint of commerce" as that term has been interpreted by this Court. (R. 1341, 1350)

(c) The special findings of the jury do not contain a question of that nature.

(d) The learned Trial Judge submitted the question of intent to conduct a sit-down strike and the jury found that the Union defendant did intend that kind of a strike. (R. 1363)

(e) Even if the court had submitted the question of intent under proper explanatory instructions to the jury, there is no evidence to support a finding of the specific intent required under the *Second Coronado Coal Case.*

(f) In his charge to the jury, the learned Trial Judge said:

> "The facts involved in this case have been ruled upon by the Circuit Court of Appeals in that regard, and the law as declared by the Circuit Court of Appeals *requires* me to say to you that if you find the defendants did the things which they are charged with doing, then, *without further proof of their intent,* you may find from those facts that the defendants did intend to re-

strain interstate commerce." (R. 1314-1315). (Italics supplied).

The learned trial judge made this point clear in his opinion denying the motion to set aside the judgment. He said:

> "its decision can only mean, that, as a matter of law, the requisite intent is conclusively presumed from the seizure of the plant by the defendants and the consequent stopping of production and shipment of goods." (R. 1389-90).

Sufficient has been said to show conclusively that the activities of the respondents in this case were not a part, nor in aid, of a general scheme or combination directed at interstate commerce or trade in hosiery for the purpose of securing control of this business, or the supply of hosiery, in order thereby to fix prices. We have already commented upon the difference between the decisions in the *First Coronado* and *Second Coronado Cases*. But we suggest that even the doctrine upon which the *Second Coronado Case* turned, may not now be applied to a similar fact situation, let alone to the facts in this case, in view of the effect on it of the National Labor Relations Act (Wagner Act)* and the public policy underlying that statute.

(a) The Economic Relation between the Sherman Act and the Wagner Act

The Sherman Act was designed to further the interests of the public and to protect it from the dangers inherent in monopolies. But it is now part of history that the Sherman Act really had failed to achieve its fundamental purpose.

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*Act of July 5, 1935, c. 372, 49 Stat. 449.

In 1933 the national policy shifted away from the tech-
que of the anti-trust acts. As a matter of fact, the National
dustrial Recovery Act* was a relaxation of the Anti-
rust Acts and permitted industry to control production,
y prices, etc. Section 7 (a), the actual forerunner of the
agner Act, was the new method to deal with massed
pital. It was predicated upon the belief that the national
come would be more equitably distributed amongst the
ople only if equality of bargaining power existed between
ganized capital and organized labor. In a real sense, the
agner Act constitutes a recognition of the fact that the
erman Act could not achieve the purpose, and that the
ly way to achieve it was to permit the growth of labor
ganizations.

Senator Wagner, in his statement in support of the Na-
nal Labor Relations Act, then known as Bill S. 1958,
fore the Senate Committee, expressed this same thought
follows:

"It is designed to further the equal balance of op-
portunity among all groups that we have always at-
tempted to preserve, despite the technological forces
driving us toward excessive concentration of power
and wealth. The first of these attempts that has con-
temporary significance was the Sherman Anti-Trust
Law, enacted in 1890 to protect the laborer, the small
business man and the consumer from the dangers of
unregulated monopolies of capital. The failure of that
noble undertaking demonstrates the impossibility of
trying to swim against the currents of economic de-
velopment. The early dissolution of the Standard Oil
Company was more spectacular than realistic. The rule
of reason enunciated in that famous case soon came

*Act of June 16, 1933, c. 90, 48 Stat. 195.

to mean that the courts found little reason in the anti-trust laws * * * (p. 32)." *Hearings before the Committee on Education and Labor, U. S. Senate 74th Congress —1st Session on S. 1958*, in March 1935. See also *Senate Report No. 573, of the 74th Congress, 1st Session*, pp. 3-4; *House Report No. 1147, 74th Congress, 1st Session*, p. 10.

It is obvious that the Wagner Act was formulated to complement the Anti-Trust Act. In view of this, how can it be said that the Sherman Act, though it is unable to fulfill its fundamental purpose, has vitality against labor organizations, which Congress believed would be able to achieve that same purpose through the process of collective bargaining?

In the process of collective bargaining, it is necessary that both sides have equality of bargaining power, and as far as a labor organization is concerned, its bargaining power may very well depend upon the strike and the boycott. How can it be said that employees may organize and form unions for the purpose of bargaining collectively with their employer, but that, if they engage in a strike, which, to the degree that it is successful, necessarily stops production, they come within the domain of the Sherman Act?

The principle of collective bargaining requires that the organization extend its influence throughout the entire industry. The tendency today is for collective bargaining to be carried on by associations of employers, constituting an entire industry or a major portion thereof, on the one side; and a labor organization, representing a very substantial portion of the workers on the other side. See *American Federation of Labor v. National Labor Relations Board*,

—U. S.—, decided January 2, 1940; see also 7 N. L. R. B. 1062.

In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, (1921), Chief Justice Taft stated the economic justification of labor unions as follows:

> "To render this combination at all effective employees must make their combination extend beyond one shop."

It is therefore clear that the doctrine of the *Second Coronado Case* has been overcome by the policy underlying the *Wagner Act*.

And further, even though a union may seek to protect its standards by attempting to organize the workers of non-union shops in the same industry, as the union did in the *Second Coronado Case*, or, by demanding an increase in wages or a diminution of hours, or improved working conditions, compel an increase in price,—this is not the same thing as price fixing, and is not a social evil, because by obtaining their demands, the purchasing power of a large body of workers is thereby improved, consumption of goods is increased, and the income from industry is more widely and more equitably distributed. And this is in the public interest.

One further word on this point.

Section 13 of the *National Labor Relations Act* specifically provides:

> "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

This section appears in that Act, despite the finding in

Section 1 that strikes materially affect, *restrain*, and control the flow of goods in the channels of commerce.

Congress must have recognized that strikes or boycotts would occur and that inconvenience to the public would flow from such activities. Nevertheless, Congress did not deem it wise to regulate strikes. Congress balanced the benefits to the public flowing from collective bargaining in the form of more equitable distribution of the national income, with the inconveniences resulting from strikes, and selected the method of collective bargaining.

In any consideration of the application of the Sherman Act to a labor case, the principle of collective bargaining and the right to engage in concerted activities by employees must be considered. It cannot be presumed that the more recent Wagner Act can be utilized to strengthen the Anti-Trust Act against the very organizations upon which national policy relies to achieve the socially desirable ends which the Sherman Act failed to bring about.

And yet the argument of the petitioner necessarily leads to such a conclusion. But it is clear that the argument of the petitioner is based upon several erroneous foundations.

(a) It fails to distinguish between the questions involved in a determination of the *constitutionality* of an Act of Congress, under the commerce clause of the constitution, and those involved in a determination of the *application* of an Act of Congress.

(b) It assumes that the commerce clause of the constitution has been expanded by the decisions validating the Wagner Act.

(c) It assumes an equivalence between the term of art "combinations or conspiracies in restraint of trade or commerce" and the term "affect commerce".

The National Labor Relations Act and the Decisions this Court Upholding its Constitutionality Have not anded the Meaning of "Commerce" nor Extended the Application of the Anti-Trust Act

he argument advanced by the petitioner proceeds on assumption that by holding the National Labor Rela- s Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 S. C. A., Sec. 151 et seq.) constitutional and applicable ctivities in manufacturing plants, the federal power been enlarged, the meaning of "in restraint of com- ce" changed, and the application of the Anti-Trust Act anded, so that now if unfair labor practices in a plant as Friedman-Harry Marks Clothing Co.[1] or Fainblatt within the federal power, because they "led or tend to to a labor dispute burdening or obstructing com- ce", then a strike which actually stops production and flow of goods into and out of the plant must necessarily within the federal power under the Sherman Act.

he fallacies which infect this contention are many. In first place the problems involved in a determination of *constitutionality* of an Act of Congress are different n the problems involved in a determination of the *appli- on* of an Act of Congress.

lthough Congress is constitutionally empowered to pro- commerce from recurrent local practices which affect mmerce directly, it is not incumbent upon Congress to ch all the evils within its field of action. The National or Relations Act cases merely affirmed the constitu ality of that Act upon a well established principle rly set forth in many cases.

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[1] National Labor Relations Board v. Friedman-Harry Marks thing Co., 301 U. S. 58.

In the *First Coronado Case, supra*, the court in denying that the Anti-Trust Act could be applied to a local strike said at p. 408

> "if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint."

In the very case relied on by the petitioner, namely *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 39, 40, the court reiterated the principle upon which Congress could constitutionally deal with local activities.

The same argument now advanced by the petitioner in this case was rejected by this Court in the *Herkert case, supra*, as follows:

> "The cases of *Stafford v. Wallace*, 258 U. S. 495 and *Chicago Board of Trade v. Olsen*, 262 U. S. 1, are also supposed in some way to sustain the view that a strike against the manufacture of commodities intended to be shipped in interstate commerce, is a conspiracy against that commerce. What those cases decided was that when Congress found from investigation that more or less constant abusive practices in a course of business usually within state police cognizance, threaten to obstruct or unduly to burden the freedom of interstate commerce, it could by law institute supervision of such course of business in order to prevent the abuses having such effect. As said in *Stafford v. Wallace* (p. 520) 'The *reasonable fear by Congress* that such acts usually lawful and affecting only intrastate commerce when considered alone, will probably, and more or less

constantly, be used in conspiracies against interstate commerce, or constitute a direct or undue burden on it, expressed in this remedial legislation, *serves the same purpose as the intent* charged in the *Swift* indictment, to bring acts of a similar character into the current of interstate commerce for federal restraint.'" (Italics supplied)

The critical words in the National Labor Relations Act "affect commerce". *Jones & Laughlin Case, supra,* 31)

"Congress did not attempt to deal with particular instances. It created for that purpose the National Labor Relations Board. In conferring authority upon that Board, Congress had regard to the limitations of the Constitutional grant of Federal power. Thus, the 'commerce' contemplated by the Act * * * is interstate and foreign commerce. The unfair labor practices which the Act purports to reach are those *affecting that* commerce. * * * And whether or not a particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to Federal control is left to be determined as individual cases arise."

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 195, 222.

The question in the *Consolidated Edison Case* was really ether the Board had exceeded the limits of Federal wer, that is—whether the employer and its employees re within such relation to interstate commerce that an fair labor practice in that plant would "affect comrce".

The principle was made even more explicit in *National*

Labor Relations Board v. Fainblatt, 306 U. S. 601. In that case, the Court held:

> "The power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate." (p. 605)

The point at issue in that case was whether or not, in view of the small size of the employer's business, the Federal power could be extended over it. The Court pointed out in Note No. 1 that the power of Congress, whether exerted under the Wagner Act or any other Act, extends to those intrastate activities which, if permitted, would result in restraint of interstate commerce. *As illustrative of the extent of Federal power*, the Court cited the *Second Coronado Coal Case*, and the *Stone Cutters Case*. These cases were cited merely to illustrate that the Federal power under the Sherman Act, may extend to activities which are wholly and purely intrastate.

The Court did not mean, and no such meaning can be extracted from these latter Labor Board decisions, that the meaning and application of the Sherman Act has been altered.

In the Labor Board cases, since the statute leaves to the Board, subject to judicial review, the question of jurisdiction, the test of the application of the Act to a particular employer is the existence "of a relationship of the employer and his employees to the commerce, such that, to paraphrase Section 10 (a) in the light of constitutional limitations, unfair labor practices have led or tend to lead 'to a labor dispute burdening or obstructing commerce.'" (p. 608). *N. L. R. B. v. Fainblatt, (supra)*:

> "It is a familiar principle that acts which directly

burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the governmental power. * * * Whether or not particular action does affect commerce in such a close and intimate fashion, as to be subject to Federal control and hence lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. *We are thus to inquire whether in the instant case, the Constitutional boundary has been passed.*" (Italics supplied)

Jones & Laughlin Case, 301 U. S. 1, (p. 31-2).

The same problem concerned the Court in the *Santa Cruz Case*, 303 U. S. 453. The Employer in that case contended that in view of the nature of its business, it did not lie within the field of Federal power. In answer to that contention, the Court said:

"The *power of Congress* extends not only to the making of rules governing sales of petitioners produced in interstate commerce, as for example with respect to misbranding under the Federal Foods and Drug Act, or with respect to forbidden discrimination in price under the Clayton Act, but also to the *protection of that interstate commerce from burdens, obstructions and interruptions, whatever may be their source.* Second Employers' Liability Cases, 223 U. S. 1, 51. The close and intimate effect which brings the subject within the reach of Federal power may be due to activities in relation to productive industry, although that industry, when separately viewed, is local. It is upon this *well established principle* that the constitutional validity of the National Labor Relations Act has been sustained. National Labor Relations

Board v. Jones & Laughlin, 301 U. S. 1, 38." (Italics supplied)

Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453.

It is too clear for further argument that, whereas the Sherman Act is directed at conspiracies or combinations which impair the freedom of competition in interstate markets and whereas local activities come within the federal power under that Act *only when they form part of a plan involving monopoly of supply or price fixing*, the National Labor Relations Act is aimed at local activities which *affect commerce*.

Activities which directly and substantially "restrain" commerce, under the Anti-Trust laws are different in nature from unfair labor practices which "affect commerce" under the National Labor Relations Act.

In *Blankenship v. Kurfman*, 96 F. (2d) 450, 456, CCA 7th, a similar argument was disposed of by the Court as follows:

> "The recent decisions in cases under the National Labor Relations Act * * * are instructive for the purpose of determining whether certain activities *affect commerce*. These cases do not involve problems of determining the existence of a conspiracy or combination *in restraint of commerce*." (Italics supplied).

The term "in restraint of commerce" is a term of art well known in the law for generations before the Anti-Trust Act was passed. Its nature has been made clear in the decisions by this court. The activities which constitute a conspiracy "in restraint of commerce" are qualitatively different from activities which merely "affect commerce".

The petitioner seized upon the language in the opinion of Chief Justice Hughes in the *Jones & Laughlin Case*, *supra*, wherein it was said that the effect on commerce in that case would be direct and immediate and not indirect and remote. We have already pointed out the principle under which the National Labor Relations Act was declared constitutional, and that under that principle, the Congress may legislate with reference to all matters which it finds affect commerce directly. There has been no departure from the Constitution.

In the *Santa Cruz Case*, *supra*, the Court clearly stated that there is a limitation to the exercise of Federal power by Congress over intrastate activities and that the limit of Federal power is referred to by the use of the antithesis *direct* and *indirect*, and also remote and close. The Court said:

> "* * * it must appear that there is a close and substantial relation to interstate commerce in order to justify the Federal intervention for its protection * * * The expansion of enterprise has vastly increased the interests of interstate commerce, but the Constitutional differentiation still obtains * * * To express this essential distinction, 'direct' has been contrasted with 'indirect', and what is 'remote' or 'distant' with what is 'close and substantial' * * * In maintaining the balance of the Constitutional grants and limitations, it is inevitable that we should define their application in the gradual process of inclusion and exclusion." (p. 466)

In other words, the Court has pointed out that, although the constitutional validity of legislation involving intrastate activities depends upon a legislative finding that such activities, as a class, directly affect commerce, in the applica-

tion of such legislation, it must appear as a matter of fact that the particular case comes within the area as to which Congress has enacted valid legislation.

Implicit in the petitioner's argument, is a blending of the word "restraint", which appears in the declaration of policy in the National Labor Relations Act, and the word "restraint" as it appears in the terms contained in the Sherman Act. It has already been seen that the terms in the Sherman Act must be treated as parts of complete phrases. In the Sherman Act the inhibitions are directed against "*contracts in restraint of trade*" and "*combinations or conspiracies in restraint of trade*". But in addition to this, it is clear, that merely because the same word appears in two pieces of legislation, enacted by the same legislative body, it does not mean that the words are similar in their meaning or application. It has even been held by this Court in *Atlantic Cleaners & Dyers, Inc. v. U. S.*, *supra*, that *the same word contained in different sections of the same statute may have different meanings.* The Court in that case distinguished between the use of the word "trade" in Section 1 of the Sherman Act and the use of the same word "trade" in Section 3 of the Sherman Act, and said:

> "Section 1, having been passed under the specific power to regulate commerce, its meaning necessarily must be limited by the scope of that power; and it may be that the words 'trade' and 'commerce' are there to be regarded as synonomous * * * In passing Section 1, Congress could exercise only the power conferred by the commerce clause, but in passing Section 3, it had unlimited power, except as restricted by other provisions of the Constitution."

In summary on this point, it is respectfully submitted that the Circuit Court of Appeals, was entirely correct

ts conclusion that the effect on interstate commerce in case at bar was indirect and remote and in refusing to blish an equivalence between the terms "in restraint ommerce" and "affect commerce".

The Circuit Court Did not Err in Holding that a stantial Amount of the Commodity Must Be Involved in a Violation of the Anti-Trust Act

is respectfully submitted that the Circuit Court did err in reversing the judgment on the ground that e was no federal jurisdiction over the local strike ely because the Court went further and showed that e can be no violation of the Sherman Act unless the me of commerce involved is substantial.

nder the rule, as laid down by this Court, there could o price fixing unless the control of the supply was iciently substantial. Thus, for example, in *Appalachian ls, Inc. v. United States*, 288 U. S. 344, the Court, after sidering the chaotic conditions in the coal industry in area, which led to the formation of the combination, that there was no violation of the Sherman Act be- e the amount of coal controlled by the combination resented but 12% of the coal entering into the interstate ket east of the Mississippi. Since "*ample competitive rtunities*" existed in the interstate market, the Court that there was no violation.

U. S. v. Patten, 226 U. S. 525, the conspiracy was d at securing control of the total available cotton sup- for the purpose of enhancing the price of all buyers very market in the country.

s we have seen, the conspiracy in *Loewe v. Lawlor*, 208 . 274, was aimed at control of all of the manufacturing

establishments in the United States, and that at the time of the institution of the secondary boycott against the plaintiff, the conspiracy had been successful in securing control (as the Court viewed it) of 70 of the 82 manufacturers in the country. The amount of the hats involved in the conspiracy in that case was really the entire field of manufactured hats.

In the *Stonecutters Case*, the Court said,

> "the present combination deliberately adopted a course of conduct which directly and substantially curtailed or threatened thus to curtail the natural flow in interstate commerce of a *very large proportion of the building limestone production of the entire country* to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-Trust Act as interpreted by this court." (Italics supplied).

In *Local 167 v. U. S.*, 291 U. S. 293, the Court found that the conspiracy dominated the entire industry and that the conspiracy

> "was not for a *temporary purpose* but to dominate a great and permanent business."

In *U. S. v. Brims*, 272 U. S. 549, the combination controlled the entire Chicago market, and excluded from entry into that market competitors from states other than Illinois.

In the *Second Coronado Case*, 268 U. S. 295, the Court deemed the production of non-union coal sufficient in amount so that if it did enter into competition with union

ed coal, it would tend to reduce the price of the com-
lity and affect injuriously the maintenance of wages
union labor in competing mines. The evidence in that
e, although not very clear on this point, was held *ade-*
te by the Court.

n *Standard Oil Company v. U. S.*, 283 U. S. 163, 169,
Court said:

"Thus appears that no monopoly of any kind, or re-
straint of interstate commerce, has been effected either
by means of the contracts or in some other way. In the
absence of proof that the primary defendants had such
control of the entire industry as would make effective
the alleged domination of a part, *it is difficult to see*
how they could by agreeing upon royalty rates control
either the price or the supply of the gasoline, or other-
wise restrain competition." (Italics supplied)

n *Glenn Coal Co. v. Dickenson Fuel Co.*, 72 F. (2d) 885,
A 4th, the Court, in commenting on the *First Coronado*
l Case, said:

"That an alleged conspiracy to suppress the pro-
duction of five thousand tons a week in a national pro-
duction of between ten million to fifteen million tons,
of a production in the particular district of 150 thou-
sand tons per week, was too negligible an amount to
have any appreciable effect upon the interstate price
of coal. Other cases holding that the public interest is
not involved unless the restraint of interstate com-
merce is substantial in amount are * * * (citing many
cases)."

t is indeed difficult to understand how the union in this
e can be held to have conspired to obtain control of the

national supply of hosiery or any part of it, merely because the respondent, Leader, refused to permit the petitioner to enter the plant for the purpose of removing finished merchandise. Nor is it possible to find such a purpose from the fact that the respondent union conducted a sit-down strike in the Apex Plant. The record shows conclusively that there was no lack of hosiery on the market during the year 1937, but in fact more hosiery was sold on the market than during the preceding year. There was no contract in restraint of commerce, nor was there any agreement in restraint of commerce amongst the participants in the sit-down strike, to carry out a scheme to control the entire industry against the public interest. Nor is there any evidence whatsoever to show that the sit-down strike in this case was part of any such conspiracy in restraint of commerce under the Sherman Act. The union in this case was not seeking by any means the control of the entire industry, or any part thereof, so as to control either the supply or the price of hosiery.

The petitioner, in its brief, relies upon *Steers v. U. S.*, 192 F. 1 (1911); *Patterson v. U. S.*, 222 F. 599, (1915); and *O'Brien v. U. S.*, 290 F. 185 (1923), in support of its contention that the amount of the commodity involved is immaterial.

The *Steers Case* involved a conspiracy or combination to control the tobacco supply in the entire area for the purpose of fixing its price and the interference of the shipment of four hogsheads of tobacco was merely the overt act in aid of the conspiracy.

The *O'Brien Case* relies upon the *Steers Case*, and was decided by the same Circuit Court of Appeals, despite the fact that the cases were entirely different. In that case, the Court held that the interference with the shipment of

e steel billet actually in transit was sufficient to make t a conspiracy in restraint of trade or commerce under e Sherman Act. The Court did not consider the question control of supply or price-fixing, but merely relied upon former decision in the *Steers Case*. It is respectfully bmitted that the *O'Brien Case* is in error.

In his dissenting opinion in the *Northern Securities Case*, *pra*, Justice Holmes said,

> "There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the Act. Although it seems to be contradicted in every way by the words in detail * * * when a combination reached a certain size, it might have attributed to it more of the character of a monopoly merely by virtue of its size, than would be attributed to a smaller one." (p. 407)

Application of the Sherman Act Does Not Depend upon the Illegality of the Means

The petitioner has, in its brief, laid stress upon the vio- nce, which unquestionably occurred in this case. We, there- re, deem it advisable to point out that this Court has ap- ied the Sherman Act without regard to peacefulness or olence of the means employed by the combination.

In *Loewe v. Lawlor*, *Duplex v. Deering* and the *Stone- tters Case*, the Sherman Act was held violated, even ough the means were peaceful; whereas in the *First*

Coronado Coal Case, the violation of local law was more flagrant than in this case; and also in the *Herkert Case* the interference with production was accomplished by illegal means.

Consequently the illegality of the means is not an element in a case under the Sherman Act.

F. Conclusion

In conclusion, it is respectfully submitted:

(1) The Sherman Act does not apply to labor unions and this is in harmony with the legislative intent.

(2) Even if the Sherman Act does apply to labor unions and their activities, the respondents did not violate that Act. The activities here involved were purely local and the effects on interstate commerce were merely indirect, incidental and remote.

(3) The respondents entertained no intent to control the supply of hosiery moving in interstate commerce, nor did they seek to fix prices of hosiery on interstate markets. The activities here involved were not part of any plan or scheme to injure the public interests by suppressing competition, or restricting competition, or obstructing the course of trade.

(4) The jury did not, and indeed could not, find an intent to control or monopolize the supply of hosiery entering and moving in interstate commerce, nor an intent to fix the price of it in interstate markets.

(5) The object, intent and purpose of the respondents was to unionize the plant by means of a sit-down strike,—a purely local matter.

(6) The National Labor Relations Act and the decisions by this Court, sustaining its constitutionality and application, have not enlarged the scope of the commerce clause of the Constitution, nor changed the meaning of the term "combination in restraint of trade". There is no equivalence between the word "restraint" and that historical term of art.

Wherefore it is respectfully submitted that the judgment of the Circuit Court of Appeals in this case should be affirmed.

Respectfully submitted,

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